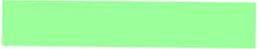


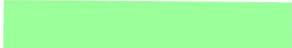


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: DEC 31 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as an "IT Consulting, Software Development" firm. In order to employ the beneficiary in a position it designates as an "IVR Software QA Tester" position, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis of her determination that the petitioner failed to demonstrate that the beneficiary qualifies for an exemption from the Fiscal Year 2014 (FY14) H-1B cap pursuant to section 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C), as claimed by the petitioner.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

In general, H-1B visas are numerically capped by statute. Pursuant to section 214(g)(1)(A) of the Act, the total number of H-1B visas issued per fiscal year may not exceed 65,000 (hereinafter referred to as the "H-1B Cap"). In addition, the maximum number of H-1B visas that may be issued per fiscal year pursuant to the H-1B cap exemption at section 214(g)(5)(C) of the Act may not exceed 20,000 (hereinafter referred to as the "U.S. Master's Degree or Higher Cap"). The petition was filed for an employment period to commence October 1, 2013. As FY14 extends from October 1, 2013 through September 30, 2014, the instant petition is subject to the FY14 H-1B Cap, unless exempt.

On April 5, 2013, U.S. Citizenship and Immigration Services (USCIS) issued a notice that it had received sufficient numbers of H-1B petitions to reach both the H-1B Cap and the U.S. Master's Degree or Higher Cap for FY14 as of that date. Therefore, April 5, 2013 is the FY14 "final receipt date," as described at 8 C.F.R. § 214.2(h)(8)(ii)(B), for acceptance of both cap subject and limited cap exempt H-1B petitions. The petitioner filed the instant visa petition requesting a U.S. Master's Degree or Higher Cap exemption on April 4, 2013, one day prior to the final receipt date.¹

Section 214(g)(5) of the Act states, in pertinent part:

The numerical limitations . . . shall not apply to any nonimmigrant alien issued a visa or otherwise provided [H-1B status] who –

¹ The decision of denial states, incorrectly, that the visa petition was submitted on April 10, 2013. A portion of the USPS mailing envelope is preserved in the record and indicates that, as counsel states on appeal, the visa petition was actually filed on April 4, 2013.

- (A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 1001(a) of Title 20), or a related or affiliated nonprofit entity.
- (B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization; or
- (C) has earned a master's or higher degree from a United States institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000.

Section 101(a) of the Higher Education Act of 1965 (Pub. Law 89-32), 20 U.S.C. § 1001(a), defines an institution of higher education as follows:

(a) Institution of higher education

For purposes of this chapter, other than subchapter IV, the term "institution of higher education" means an educational institution in any State that—

- (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, or persons who meet the requirements of section 1091 (d) of this title;
- (2) is legally authorized within such State to provide a program of education beyond secondary education;
- (3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree, or awards a degree that is acceptable for admission to a graduate or professional degree program, subject to review and approval by the Secretary;
- (4) is a public or other nonprofit institution; and
- (5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or

association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

At Part C of the Form I-129 H-1B Data Collection Supplement, the petitioner made clear that it was applying for one of the U.S. Master's Degree or Higher Cap exemptions to be issued to 20,000 holders of master's or higher degrees from United States institutions of higher education, as defined in 20 U.S.C. § 1001(a). Specifically, item "1" of that section requests that the petitioner "[s]pecify how this petition should be counted against the H-1B numerical limitations (a.k.a. the H-1B 'Cap')." The petitioner checked box "b," indicating, "Cap H-1B U.S. Master's Degree or Higher." At item "2" of that section, which requested that the petitioner identify the beneficiary's advanced degree and the institution where the beneficiary received it, the petitioner indicated that the beneficiary received a master's degree from [REDACTED] California. Evidence in the record confirms that the beneficiary received a master's degree from that institution on December 31, 2010.

An RFE issued on April 25, 2013 requested, *inter alia*, the following:

[P]rovide evidence that the beneficiary is eligible to be counted against the H-1B Master's Degree or Higher Cap as a graduate of an institution of higher education as defined in the Higher Education Act of 1965, section 101(a), 20 U.S.C. section 1001(a).

In response to the RFE, counsel submitted evidence pertaining to the accreditation status of [REDACTED]. Counsel also contends in a letter dated June 14, 2013, that Congress granted USCIS "leeway to move a case from one numerical limitation to another." The director denied the visa petition on July 3, 2013, finding that the petitioner had not demonstrated that the beneficiary is eligible for the exemption from the cap for which the petitioner had applied. Specifically, the director noted that [REDACTED] was not preaccredited until June 24, 2011, and found that "[s]ince the petitioner filed the instant petition after the date on which USCIS ceased to accept new H-1B petitions for fiscal year 2014 and the beneficiary has not earned a master's or higher degree from a United States institution of higher education, the beneficiary's eligibility for the benefit sought has not been established."

On appeal, counsel does not assert that the beneficiary is eligible for the exemption for which the petitioner applied. Instead, counsel observes that the petitioner filed the visa petition on April 4, 2013 and asserts that, if the beneficiary was not eligible for the exemption for which the petitioner applied, then the visa petition should have been considered pursuant to the general category FY14 H-1B Cap, as the petition was filed before the April 5, 2013 final receipt date for the regular H-1B Cap.

Although counsel does not contend on appeal that the instant visa petition was eligible for the U.S. Master's Degree or Higher Cap, the AAO will nevertheless address that issue as it is relevant to the petitioner's eligibility for a general H-1B Cap number. To demonstrate that an exemption is available pursuant to the U.S. Master's Degree or Higher Cap exception to the general H-1B Cap, a petitioner must demonstrate that the beneficiary earned a master's or higher degree from a United States institution of higher education as defined in 20 U.S.C. § 1001(a). As is stated in that section, in order to qualify as such an institution, a school must be accredited by a nationally recognized accrediting agency or association, or have been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status.

Evidence in the record indicates that the beneficiary earned his U.S. master's degree from [REDACTED] on December 31, 2010. The claim of eligibility for the advanced degree exception to the regular cap is based on that degree, and the record contains no evidence that the beneficiary has received any other advanced degree. However, the record does not contain evidence that, on December 31, 2010, [REDACTED] was accredited by or had been granted preaccreditation status by any recognized accrediting agency; therefore, the beneficiary is ineligible for the advanced degree exception to the regular cap based on his master's degree awarded by [REDACTED].

The AAO now turns to counsel's argument that the instant visa petition was approvable pursuant to the general H-1B Cap. The Code of Federal Regulations at 8 C.F.R. § 214.2(h)(8)(ii)(B) reads in pertinent part as follows:

When calculating the numerical limitations or the number of exemptions under section 214(g)(5)(C) of the Act for a given fiscal year, USCIS will make numbers available to petitions in the order in which the petitions are filed. . . . Petitions subject to a numerical limitation not randomly selected or that were received after the final receipt date will be rejected. Petitions filed on behalf of aliens otherwise eligible for the exemption under section 214(g)(5)(C) of the Act not randomly selected or that were received after the final receipt date will be rejected if the numerical limitation under 214(g)(1) of the Act has been reached for that fiscal year. Petitions indicating that they are exempt from the numerical limitation but that are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied and filing fees will not be returned or refunded. . . .

As stated earlier, the record does not contain evidence that [REDACTED] was accredited by or had been granted preaccreditation status by any recognized accrediting agency at the time it awarded the beneficiary a master's degree. Accordingly, absent evidence to the contrary, the petitioner should have checked box "a" at Part C, section 1 of the Form I-129 H-1B Data Collection Supplement, indicating that the beneficiary is subject to the numerical limitation contained in section 214(g)(1)(A) of the Act.

As noted above, however, 8 C.F.R. § 214.2(h)(8)(ii)(B) provides that "[p]etitions indicating that they are exempt from the numerical limitation but that are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied" The actual determination date for the beneficiary's ineligibility for this claimed U.S. Master's Degree or Higher Cap exemption is the date the director determined that the petition is not exempt from the standard 65,000 numerical limitation, i.e., July 3, 2013.

The petitioner filed the instant petition claiming the U.S. Master's Degree or Higher Cap exemption and USCIS records indicate that the instant petition was received by USCIS as a petition exempt from the numerical limitation based upon that claim. It is noted that the RFE asking the petitioner to demonstrate that the visa petition was eligible for the exemption claimed was issued on April 25, 2013, a date after the final receipt date. On that date, the director had not yet determined that the instant visa petition was subject to the cap. As the petition was received as a FY14 U.S. Master's Degree or Higher Cap filing and as a determination that the beneficiary was ineligible for that claimed exemption was made after April 5, 2013, the petition must be denied as there are no remaining FY14 H-1B visa numbers available to be assigned to the beneficiary.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.